

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 1999 Session

LONNIE GEORGE PATE v. CYNTHIA MARIE PATE

**Appeal from the Chancery Court for Wayne County
No. 9887 Jim T. Hamilton, Judge**

No. M1998-00947-COA-R3-CV - Filed August 27, 2001

This appeal involves the dissolution of a 23-year marriage. The husband first filed a petition for divorce in the Chancery Court for Wayne County alleging that the wife was chemically dependent and had committed adultery. The wife counterclaimed for divorce, alleging that the husband had abused her physically and psychologically during the marriage. Following a bench trial, the trial court declared the parties divorced in accordance with Tenn. Code Ann. § 36-4-129(b)(Supp. 2000) and divided the remaining disputed items of marital property. On this appeal, the husband asserts (1) that there is no evidentiary foundation for the trial court's finding that the wife had suffered physical and psychological abuse throughout the marriage, (2) that the trial court erred by declaring the parties divorced, and (3) that the division of the marital estate was inequitable. We have concluded that the evidence does not preponderate against the trial court's finding that the husband engaged in inappropriate conduct during the marriage and, therefore, that the trial court did not err by declaring the parties divorced. We have also concluded that the trial court erred by awarding the wife more than an equal share of the value of the marital residence and by failing to award the husband an equal share of the remaining disputed items of marital property. Therefore, we modify the division of the marital estate accordingly.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Modified
and Affirmed**

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

W. Andrew Yarbrough, Waynesboro, Tennessee, for the appellant, Lonnie George Pate.

George G. Gray, Waynesboro, Tennessee, for the appellee, Cynthia Marie Pate.

OPINION

I.

Cynthia Marie Pate and Lonnie George Pate were married in 1974 in Florida. Ms. Pate was twenty-three years old at the time, and Mr. Pate was twenty-eight. Both parties had been married

before. Mr. Pate had two daughters from his previous marriage, but the parties had no children of their own. After the parties had lived in St. Augustine, Florida for over fifteen years, Mr. Pate's health problems prompted them to move to Tennessee and to build a house on property given to them by Mr. Pate's parents. They lived in a rustic farmhouse while their house was being built. During this six- to seven-month period, both parties worked on the house and did not seek other employment. Once the house was completed, Mr. Pate found work in a local hardware store, and Ms. Pate opened her own medical transcription and secretarial business.

Both parties regularly consumed alcohol and marijuana throughout the marriage. On several occasions Mr. Pate stopped smoking marijuana and reduced his consumption of alcohol. During one of three periods of relative abstinence, Mr. Pate became concerned that they were abusing these substances and even shared with Ms. Pate's mother and other acquaintances his concerns about Ms. Pate's dependency. At the same time, Ms. Pate began confiding that she had endured physical and psychological abuse during the latter part of the marriage and that she had been involved in two extramarital affairs.

All this came to a head in April 1997 during a five-day visit by Mr. Pate's former son-in-law, his granddaughter, and his former son-in-law's current wife. Mr. Pate did not use marijuana and abuse alcohol during this visit, but Ms. Pate consumed both alcohol and marijuana throughout the entire visit. Soon after the guests left, Mr. Pate confronted Ms. Pate about her substance abuse. He retrieved a box containing Ms. Pate's marijuana from its usual hiding place in the bathroom and set out to throw it into a stream near the back of their house. Ms. Pate followed Mr. Pate and attempted to stop Mr. Pate from throwing \$200 worth of marijuana into the stream. Ms. Pate asserted that Mr. Pate pushed her into the stream during the ensuing altercation, but Mr. Pate asserted that Ms. Pate fell on the slippery stones in the creek. Ms. Pate was slightly injured.

Following this incident, Ms. Pate moved in with her parents who lived nearby. For several days, she returned to the parties' house while Mr. Pate was at work to retrieve her belongings and the equipment she needed to operate her business. Soon thereafter, Mr. Pate changed the locks on the doors of the parties' house and, in April 1997, filed a complaint in the Chancery Court for Wayne County seeking a divorce on the grounds of inappropriate marital conduct and irreconcilable differences. Ms. Pate later filed a counterclaim seeking a divorce on the same grounds and asserting that Mr. Pate had physically and psychologically abused her during the marriage.

The parties had divided most of their marital property by the time the case came on for trial. Accordingly, the trial focused chiefly on the parties' opposing claims of inappropriate marital conduct and the division of the remainder of their marital estate. At the conclusion of the hearing, the trial court directed the parties to submit letters detailing their proposed classification and division of the remaining marital property. After waiting sixteen days for the parties' letters, the trial court entered an order on January 28, 1998, declaring the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b) and awarding Ms. Pate \$55,550 of the equity in the marital home, as well as the other items of personal property she had requested.

Mr. Pate filed a timely Tenn. R. Civ. P. 59.04 motion taking issue with the evidentiary basis for the trial court's decisions with regard to the divorce and the division of the remaining items of marital property. On June 25, 1998, the trial court filed an order denying Mr. Pate's request for post-trial relief concluding that "there was ample evidence of mental and physical abuse during the marriage from the testimony of the wife" and that "both parties were at fault in this case." Mr. Pate has appealed and now takes issue both with the trial court's decision to declare the parties divorced and with the manner in which the trial court divided the parties' remaining marital property.

II.

THE TRIAL COURT'S DECISION TO DECLARE THE PARTIES DIVORCED

Mr. Pate challenges the trial court's decision to declare the parties divorced on two fronts. First, he asserts that the evidence preponderates against the trial court's finding that Ms. Pate "suffered physical and mental abuse throughout this marriage." Second, he argues that the trial court erred by declaring the parties divorced under Tenn. Code Ann. § 36-4-129(b) and that he should have been awarded the divorce. We have concluded that the evidence does not preponderate against the trial court's conclusion that Mr. Pate engaged in inappropriate conduct during the marriage. From this conclusion, it necessarily follows that the trial court did not err by concluding that both parties were at fault and declaring them divorced in accordance with Tenn. Code Ann. § 36-4-129(b).

A.

STANDARD OF REVIEW OF THE TRIAL COURT'S FACTUAL FINDINGS

Appellate courts employ the familiar standards in Tenn. R. App. P. 13(d) to review a trial court's findings of fact regarding the grounds for divorce. *Earls v. Earls*, 42 S.W.3d 877, 911 (Tenn. Ct. App. 2000); *Hobbs v. Hobbs*, 987 S.W.2d 844, 846 (Tenn. Ct. App. 1998). This standard requires us to defer to the trial court's findings of fact, *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000), and to presume that these findings are correct "unless the preponderance of the evidence is otherwise." This presumption, however, does not come into play when the trial court has not made specific findings of fact on a particular matter. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000).

Reviewing findings of fact under Tenn. R. App. P. 13(d) necessarily requires an appellate court to weigh the evidence to determine in which party's favor the aggregate weight of the evidence falls. The prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *McBee v. Bowman*, 89 Tenn. 132, 140, 14 S.W. 481, 483 (1890). Accordingly, the presumption of correctness in Tenn. R. App. P. 13(d) requires us to leave a trial court's finding of fact undisturbed unless we determine that the aggregate weight of the evidence demonstrates that a factual finding other than the one found by the trial court is more probably true. *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

Our review of a trial court's findings of fact is constrained by the practical recognition that the trial judge, as the trier-of-fact, has a better opportunity to observe the manner and demeanor of all the witnesses when they testify. *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997); *Lindsey v. Lindsey*, 930 S.W.2d 553, 556 (Tenn. Ct. App. 1996). Accordingly, we give great

weight to a trial court's factual findings when they rest on the trial court's determination of the credibility of the witnesses. *Randolph v. Randolph*, 937 S.W.2d 815, 819 (Tenn. 1996); *Hobbs v. Hobbs*, 987 S.W.2d at 847; *Umstot v. Umstot*, 968 S.W.2d 819, 825 (Tenn. Ct. App. 1997).

B.

MR. PATE'S CONDUCT DURING THE MARRIAGE

Ms. Pate testified extensively regarding Mr. Pate's physical and psychological abuse during the marriage. She recounted two occasions in Florida when he choked her, as well as a similar incident in 1991. She also described how Mr. Pate pushed her in the stream during their confrontation over the marijuana and produced medical evidence substantiating her injuries during that incident. In addition to these descriptions of physical abuse, Ms. Pate recounted how Mr. Pate repeatedly called her "fat" and "disgusting" and how, on occasion, he told her that he hated her and that he wished she were dead. Mr. Pate vigorously denied that he had ever mistreated Ms. Pate either physically or psychologically.

Upon hearing this evidence, the trial court announced that the evidence of fault was "[e]ven Steven right now." Thereafter, the court filed an order finding that Ms. Pate "suffered physical and mental abuse throughout this marriage." In response to Mr. Pate's Tenn. R. Civ. P. 59.04 motion, the trial court reiterated that "there was ample evidence of mental and physical abuse during the marriage from the testimony of the wife." The trial court then made an express credibility determination by adding that "[t]his Court chooses who to believe and who not to believe." Thus, for the purpose of this appeal, we must conclude that the trial court chose to believe Ms. Pate's version of events rather than Mr. Pate's.

Tennessee's courts are reluctant to grant a divorce based on uncorroborated testimony when corroborating evidence is reasonably available. *Farrar v. Farrar*, 553 S.W.2d 741, 744 (Tenn. 1977); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). However, the preference for corroborating evidence is only a general rule of policy, *Dukes v. Dukes*, 528 S.W.2d 43, 46 (Tenn. Ct. App. 1975), rather than an inflexible standard because the courts recognize that circumstances can arise that make providing corroborating evidence difficult if not impossible. *Fulford v. Fulford*, 156 Tenn. 640, 642, 4 S.W.2d 350, 350-51 (1928).

The public is generally not privy to the private indignities couples in a dysfunctional marriage visit on each other. Whether because of a desire for privacy or shame or fear, parties do not customarily or lightly share intimate conjugal details with others. Accordingly, this case is not the first time that a trial court has been faced with conflicting testimony from divorcing parties regarding their private dealings. When this circumstance arises, trial courts may base their factual findings on their own determination of the credibility of the witnesses. *Bush v. Bush*, 684 S.W.2d 89, 94 (Tenn. Ct. App. 1984); *Dukes v. Dukes*, 528 S.W.2d at 45.

In this case, the trial court clearly did not believe Mr. Pate's adamant protestations that he had never physically or psychologically mistreated Ms. Pate during their twenty-three year marriage. The court accredited Ms. Pate's testimony that Mr. Pate had choked her on several occasions, had pushed her in the creek during their confrontation over her marijuana, and had verbally abused her.

We have no objective basis to second-guess the trial court's conclusion that Ms. Pate's testimony was more believable than Mr. Pate's and, therefore, accord great weight to the trial court's finding that Mr. Pate physically and psychologically mistreated Ms. Pate during the marriage.

C.

THE DECISION TO DECLARE THE PARTIES DIVORCED

Mr. Pate also asserts that the trial court erred by declaring the parties divorced pursuant to Tenn. Code Ann. § 36-4-129(b). In addition to arguing that there is no credible evidence of fault on his part, Mr. Pate appears to argue that he is entitled to the divorce because Ms. Pate's conduct was worse than his and because his proof of her fault is stronger than Ms. Pate's proof regarding his fault. These arguments reflect a misunderstanding of Tenn. Code Ann. § 36-4-129(b).

Tenn. Code Ann. § 36-4-129(b) permits a trial court to declare the parties divorced not only when both parties have proved that they have grounds for divorce, but also when only one party has proved grounds for divorce. By its own terms, the statute empowers a court to "grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties divorced, rather than awarding a divorce to either party alone." Tenn. Code Ann. § 36-4-129(b) does not require the trial court to weigh the relative degrees of fault or to grant the divorce to the party who, in the court's mind, is less at fault. *Wilson v. Wilson*, 987 S.W.2d 555, 558 (Tenn. Ct. App. 1998) (declaring the parties divorced despite a finding that the wife was more at fault); *Varley v. Varley*, 934 S.W.2d 659, 665 (Tenn. Ct. App. 1996) (holding that the trial court is not required to make written findings regarding the relative degrees of fault).

There is no question of Ms. Pate's inappropriate marital conduct in this case. Her admitted adultery and the evidence of her abuse of alcohol and marijuana provide an ample basis for concluding that her conduct contributed to the disintegration of the parties' marriage. By the same token, however, Mr. Pate's conduct, as the trial court found it, also contributed to the disintegration of the parties' marriage. Tenn. Code Ann. § 36-4-129(b) does not require the trial court or this court to decide which of these two parties is most at fault. In light of the trial court's conclusion that "both parties were at fault in this case," we find no error in the trial court's decision to declare them divorced in accordance with Tenn. Code Ann. § 36-4-129(b).

III.

THE DIVISION OF THE MARITAL PROPERTY

Mr. Pate also takes issue with the manner in which the trial court divided the marital property that the parties' themselves had not already divided by the time of the divorce hearing. Specifically, he asserts that the trial court erred by (1) dividing the disputed marital estate before receiving the parties' proposed divisions, (2) basing its division of the property on fault, (3) overlooking Ms. Pate's individual retirement account, and (4) dividing the marital estate inequitably. We have determined that the trial court erred by failing to classify and divide Ms. Pate's individual retirement account as marital property and by failing to equally divide the remaining items of disputed marital property.

A.

The parties accumulated a modest amount of real and personal property during their 23-year marriage. Their single most valuable asset was the house they constructed on seventy acres of property given to them by Mr. Pate's parents. The stipulated value of the house and property at the time of trial was \$101,000. Both parties had individual retirement accounts and life insurance policies; however, they had liquidated most of these assets to defray the costs of their move from Florida to Tennessee and the construction of their house. At the time of trial, Ms. Pate had approximately \$3,675 remaining in an individual retirement account established while she was working for Blue Cross Blue Shield in Florida. The parties also owned a \$15,000 certificate of deposit, a small savings account, and various items of personal property.

By the time of trial, the parties had divided their personal property and spent most of their liquid assets. Ms. Pate had retrieved her business equipment and furnishings¹ and other items of personal property² from the parties' house.³ Mr. Pate retained the items remaining in the home.⁴ The only items remaining to be divided were the marital residence, Ms. Pate's \$3,675 individual retirement account, and several other items of personal property.⁵ Noting that Ms. Pate had incurred \$33,500 in indebtedness to purchase a house after the parties' separation, the trial court awarded her \$55,550 of the equity in the parties' marital residence and other items of personal property she requested during her deposition. The trial court never addressed Ms. Pate's individual retirement account.

B.

Mr. Pate first argues that the trial court erred when it entered the order on January 28, 1998, dividing the disputed items of marital property because he had not yet submitted the letter containing the proposed division of property requested by the trial court at the conclusion of the January 12,

¹This property included two computers, a fax machine, a copying machine, a transcriber, a paper shredder, an office chair, and other office equipment.

²This property included jewelry, a camera, a vacuum cleaner, her china from a former engagement, a piano, a television, stereo equipment, a bedroom suite, lamps, various other furnishings and kitchen utensils, and a 1988 Ford Bronco.

³The estimated value of all this property was \$18,000.

⁴This property, valued at approximately \$9,000, included two recliners, a safe, two four-wheelers, a lawnmower, lamps, and appliances. Mr. Pate also retained his separate property which included a 1990 Ford F150 truck that his father had given to him for his birthday, as well as guns and a collection of knives he had inherited from his father and brother-in-law.

⁵Ms. Pate identified these items during her deposition. They included: the title to the Ford Bronco that was already in her possession, cooking utensils, a blue trailer, a canoe, a handmade quilt, a book, steak knives and a carving set, her grandmother's linen tablecloth, wine glasses, a wooden salad bowl, a picture, a four-wheeler, a riding mower, a leaf blower, and a weed eater.

1998 hearing. He asserts that the trial court did not have sufficient evidence to divide the disputed items of marital property without this letter. We respectfully disagree.

After both parties had concluded their cases at the January 12, 1998 hearing, the lawyer representing Mr. Pate told the trial court that he had overlooked submitting a list of the parties' property and Mr. Pate's estimation of the value of this property. The lawyer representing Ms. Pate took issue with the list stating that it included separate as well as marital property and indicated that he desired to put on additional evidence if Mr. Pate's list was introduced. With the case in this posture, the trial court directed the parties' lawyers to "just write me a letter and put in there what you think the personalty that is left is, what pieces are separate property, if any, what are marital assets, and tell both your clients not to dispose of anything while the court has this under advisement." After waiting for sixteen days without receiving the requested letters, the trial court filed an order on January 28, 1998, declaring the parties' divorced and undertaking to divide their remaining marital property.

On February 25, 1998, Mr. Pate filed a Tenn. R. Civ. P. 59.04 motion, asserting that the evidence did not support the division of the disputed property in the January 28, 1998 order and requesting that the trial court reduce Ms. Pate's share of the equity in the marital residence from \$55,550 to \$50,500. When this motion was heard on March 9, 1998, neither party had filed the letter requested by the trial court. During the hearing, Mr. Pate's lawyer stated that he had not filed his letter because he was waiting to review his adversary's letter. For his part, Ms. Pate's lawyer stated that he had not filed his letter because he was waiting to discuss the division of the property with Mr. Pate's lawyer when Mr. Pate's lawyer's schedule was "not so busy."

We gather from the transcript of the March 9, 1998 hearing that Mr. Pate's lawyer tendered his letter to the court during the hearing. The trial court stated that "I don't know that I'll give it any credence because it never was filed, but I'll look at it." The trial court added that it would "take into consideration that's his [Mr. Pate's] evaluation not any sort of appraisals." When the trial court filed its June 25, 1998 order denying Mr. Pate's Tenn. R. Civ. P. 59.04 motion, we presume that it had considered the substance of the letter tendered by Mr. Pate's lawyer during the March 9, 1998 hearing but that the letter did not affect the trial court's decision.⁶

Mr. Pate's concern over the trial court's decision to decide that case without waiting for his lawyer to file a post-trial letter is unconvincing for two reasons. First, neither lawyer presented a persuasive explanation for his delay in filing the letter in a more timely manner. Second, his assertion that the trial court lacked sufficient evidence for equitably dividing the disputed items of marital property is not supported by the record. Both parties had agreed during the trial about the value of the marital residence and how they acquired it. They had also agreed about how they had divided up most of their personal property prior to the hearing. In addition, both parties had presented testimony regarding their checking account, their certificate of deposit, their life insurance policies, their individual retirement accounts, and retirement accounts, as well as their work history,

⁶For some unexplained reason, the letter Mr. Pate's lawyer tendered to the trial court during the March 9, 1998 hearing is not in the record. Neither party has sought to add this letter to the appellate record. Accordingly, we are unable to review it.

their educational level, their earning capacity, and other factors relevant to the division of marital property. They had also tendered documents relating to Ms. Pate's individual retirement account, the warranty deed for their property, itemized lists of property indicating how the property was acquired, and Ms. Pate's post-separation indebtedness to the Bank of Waynesboro. While the trial court would have been well-advised to set a deadline for these letters, we conclude that the trial court did not commit reversible error by electing to divide the disputed items of marital property approximately two weeks following the bench trial without continuing to wait for the parties to submit the letters it had requested.

C.

Mr. Pate also takes the trial court to task for overlooking Ms. Pate's retirement account valued at approximately \$3,675. He asserts that this retirement account should have been included in the marital estate because Ms. Pate earned the funds that were deposited into the account during the marriage. We agree that this account was marital property and that the trial court erred by failing to specifically include this account in its division of the disputed items of marital property.⁷ Accordingly, we will treat this account as marital property when we address Mr. Pate's argument that the net effect of the trial court's division of the disputed items of marital property was inequitable.

D.

In his third attack on the trial court's division of the disputed items of marital property, Mr. Pate argues that the trial court allowed considerations of fault to color his decision about how the parties' remaining property should be divided. He bases this argument on the trial court's statements in its January 28, 1998 and June 25, 1998 orders that Ms. Pate had been "forced to leave the marital home and incur an indebtedness by purchasing a home in Iron City, Tennessee." On the face of things, it is difficult to perceive how this statement, by itself, reflects the trial court's consideration of fault any more than it reflects the trial court's recognition of the economic circumstances of the parties at the time of the divorce hearing.

Eighteen years ago, the Tennessee Supreme Court held that the courts should not consider the parties' fault when they are dividing the parties' marital property. *Fisher v. Fisher*, 648 S.W.2d 244, 246-47 (Tenn. 1983). Less than two months later, the Tennessee General Assembly amended the statute governing the division of marital property to remove fault as one of the factors to consider when dividing a marital estate.⁸ Accordingly, Tenn. Code Ann. § 36-4-121(a)(1) (Supp. 2000) specifically directs the courts to "equitably divide, distribute or assign the marital property between the parties without regard to marital fault."

⁷ Based on this record, we cannot determine whether the trial court simply overlooked this asset or decided that it was Ms. Pate's separate property. The trial court would have been wrong in either case.

⁸ Act of May 12, 1983, ch. 414, § 4, 1983 Tenn. Pub. Acts 798, 800.

Trial courts, for the most part, appear to have followed the dictates of the *Fisher v. Fisher* decision and Tenn. Code Ann. § 36-4-121(a)(1). A division of a marital estate must be equitable, but depending on the circumstances, an equitable division is not necessarily an equal one. *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Manis v. Manis*, ___ S.W.3d ___, ___, 2001 WL 60616, at *9 (Tenn. Ct. App. 2001); *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998). Accordingly, a trial court's decision not to award divorcing parties equal shares of the marital estate does not necessarily reflect that the trial court considered fault when it divided the marital property. *Ford v. Ford*, 952 S.W.2d 824, 826-27 (Tenn. Ct. App. 1996) (holding that the fact that the trial court awarded 69% of the net marital estate to the wife does not reflect that the trial court took the husband's fault into consideration).

The trial court explicitly stated in its order denying Mr. Pate's Tenn. R. Civ. P. 59.04 motion that it "decided to distribute the marital property based on the evidence presented at the trial and nothing else." Its observation that Ms. Pate was forced to incur indebtedness by purchasing a home in Iron City, if anything, is consistent with the factors that may be considered in connection with the division of marital property. Accordingly, we have determined that Mr. Pate has not demonstrated that the trial court's division of the disputed items of personal property was based on impermissible considerations.

E.

As a final matter, Mr. Pate argues that the manner in which the trial court divided the disputed items of marital property was inequitable. He asserts that the trial court's decision is flawed because (1) the trial court awarded Ms. Pate all the personal property listed on Exhibit 10 of her deposition even though this property was still in his possession, (2) the trial court failed to specifically address Ms. Pate's individual retirement account, and (3) the trial court awarded Ms. Pate more than one-half of the equity in the parties' marital home. Based on the facts of this case, we find Mr. Pate's arguments to be well-taken.

We have already concluded in Section III(C) of this opinion that the trial court erred by failing to include Ms. Pate's individual retirement account in its division of the marital property. We will consider it now because this asset clearly qualifies as marital property in that it comes from income Ms. Pate earned during the marriage. An equitable division of marital property does not require that each person receive a share of every piece of property that is determined to be marital property. *King v. King*, 986 S.W.2d at 219; *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994). This account is currently in Ms. Pate's name, and withdrawing these funds at this time would result in adverse tax consequences and a penalty for early withdrawal. Accordingly, we have determined that Ms. Pate should be awarded the \$3,675 remaining in her individual retirement account.

The testimony regarding the items identified on Exhibit 10 of Ms. Pate's deposition is not as one-sided as it is portrayed by Mr. Pate. Many of these items, such as the blue trailer, were not necessarily gifts to Mr. Pate alone. The record indicates that both Mr. Pate's and Ms. Pate's parents gave the parties real and personal property during the marriage. The gifts were to both parties, rather than to one party or the other, and they were intended to benefit both parties. Accordingly, there is

ample evidence in the record to support the implicit determination by the trial court that these items were marital property and, therefore, subject to division. A number of the items identified on this exhibit formerly belonged to members of Ms. Pate's family, and thus the trial court did not err by awarding these items to Ms. Pate.

As best we can reconstruct this record, the parties' marital estate, including the personal property they divided before the divorce hearing, was valued at \$136,675.⁹ As a result of the trial court's division of this property, Ms. Pate received property worth \$82,225¹⁰ or 60% of the total value of the marital estate, and Mr. Pate received property worth \$54,450¹¹ or 40% of the total value of the marital estate. Mr. Pate argues that this net result is inequitable.

Dividing marital property is not a mechanical process based on some formula. Rather, it is a deliberate process guided by a thoughtful consideration of the factors in Tenn. Code Ann. § 36-4-121(c) (Supp. 2000). Trial judges have wide latitude in arriving at an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d at 246; *Brown v. Brown*, 913 S.W.2d at 168, and appellate courts give considerable weight to a trial court's decision with regard to marital property. *Goodman v. Goodman*, 8 S.W.3d 289, 298 (Tenn. Ct. App. 1999); *Kinard v. Kinard*, 986 S.W.2d 220, 230-31 (Tenn. Ct. App. 1998); *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, appellate courts will ordinarily defer to a trial court's division of marital property unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c), or it is not supported by a preponderance of the evidence. *Brown v. Brown*, 913 S.W.2d at 168; *Mahaffey v. Mahaffey*, 775 S.W.2d 618, 622 (Tenn. Ct. App. 1989).

As a starting point, ownership of marital property should be presumed to be equal until proven otherwise. *Dortch v. Dortch*, No. M1999-02053-COA-R3-CV, 2001 WL 799752, at * 3 (Tenn. Ct. App. July 17, 2001); *Kelly v. Kelly*, 679 S.W.2d 458, 462 (Tenn. Ct. App. 1984); *Salisbury v. Salisbury*, 657 S.W.2d 761, 770 (Tenn. Ct. App. 1983). The trial court provided little insight in this case concerning the basis for his conclusion that a 60%-40% split was more equitable than dividing the marital estate equally. We can only surmise that its decision was, in large part, motivated by Mr. Pate's post-separation housing expenses. While Tenn. Code Ann. § 36-4-121(c)(8) certainly permits the trial court to take these expenses into consideration, we have concluded that the record does not support the trial court's decision to award Ms. Pate more than 50% of the equity in the parties' residence and to decline to offset the award to Ms. Pate by the one-half of the value of the property listed on Exhibit 10 of her deposition and one-half of the value of her individual retirement account.

⁹The marital estate included the marital residence (\$101,000), Ms. Pate's IRA (\$3,675), the personal property divided prior to the hearing (\$27,000), and the property identified on Exhibit 10 to Ms. Pate's deposition (\$5,000).

¹⁰Under the trial court's award, Ms. Pate received \$55,550 of the equity in the marital residence, her \$3,675 IRA, \$18,000 in personal property divided prior to the hearing, and \$5,000 in property identified on Exhibit 10 to her deposition.

¹¹Under the trial court's award, Mr. Pate received \$45,450 of the equity in the marital residence and \$9,000 in personal property divided prior to the hearing.

Based on the evidence regarding the length of the marriage, Ms. Pate's monetary and non-monetary contributions to the family and to the acquisition of the parties' marital estate, as well as the parties' health and earning capacity, we have concluded (1) that Ms. Pate did not provide the trial court with a sufficient basis for awarding her more than one-half of the value of the parties' residence and (2) that the trial court should have made an additional award to Mr. Pate to offset one-half of the value of the personal property listed on Exhibit 10 of Ms. Pate's deposition and one-half of the value of Ms. Pate's individual retirement account that was awarded to Ms. Pate.

Accordingly, we have determined that the trial court's award to Ms. Pate of \$55,550 of the equity in the parties' residence should first be reduced by \$5,505 to equalize the distribution of the equity in the parties' residence. Then, the award should be reduced by \$1,837.50 representing one-half of the value of Ms. Pate's individual retirement account. Finally, the trial court should have reduced that award by \$2,500 representing one-half the value of the personal property contained in Exhibit 10. Accordingly, the \$55,550 award to Ms. Pate in the trial court's January 28, 1998 order is reduced to \$45,707.50. As a result of these modifications, Ms. Pate will receive \$72,382.50 or 53% of the marital estate, and Mr. Pate will receive \$64,292.50 or 47% of the marital estate.

IV.

In summary, we affirm the trial court's decision to declare the parties divorced in accordance with Tenn. Code Ann. § 36-4-129(b), as well as the trial court's decision to award Ms. Pate her individual retirement account and the personal property identified on Exhibit 10 of her deposition. However, we modify the judgment awarding Ms. Pate \$55,550 from the equity in the marital residence by reducing it to \$45,707.50. We remand the case to the trial court for further proceedings consistent with this opinion, and we tax the costs in equal proportions to Lonnie Pate and his surety and to Cynthia Pate for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE